Tong Chor Say & Ors v Batang Malaka Rubber Estate Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — ORIGINATING PETITION NO D9 (D3)–26–47 OF 2003
AZAHAR MOHAMED J
6 MAY 2009

Companies and Corporations — Members' rights — Oppression — Petition for relief — Company's decision not to subscribe to rights issue — Whether decision was in interest of members and company — Whether company's affairs had been conducted in a manner oppressive to minority shareholders — Companies Act 1965 s 181

The first respondent company ('the company') was a cultivation and oil palm investment holding with twenty six shareholders. The second to fifth respondent, including the sixth and seventh respondent private limited companies, were all shareholders of the company, while the eighth respondent was an alternate director. In addition, the second to fifth and eighth respondents belong to the same family ('the Soon family') and also have shareholding control over the sixth and seventh respondent companies. The second to seventh respondents held 55.7% of the shares in the company while the twenty petitioners in the present action were the minority shareholders holding 44.3% of the shares in the company. The board of directors of the company consisted of the second to fifth respondents, the eighth respondent and two other members of the Soon family. The petitioners' complaint in this action arose from two rights issue offered by a company known as Ace Agricultural Sdn Bhd ('ACE'). At that time the first respondent company held 20% of the shares in ACE, the Soon family collectively held 62% of shares in ACE and the other shareholders the remaining 18% of the shares in ACE. The two rights issues were offered to the company, being one of the shareholders of ACE, at RM1 a share, but the board of directors of the company decided not to take it up. At the same time, the sixth respondent whose board of directors was almost identical to the board of directors of the first respondent company took up the two rights issue. As a result of the non-subscription to the rights issue by the company in ACE, the company's equity interest in ACE was reduced from the initial 20% to 10.67%. At the company's AGM on 30 June 2003, when the fifteenth petitioner's proxy questioned the company's board of directors as to why it had not taken the two rights issue offered by ACE, the board of directors deferred answering the question. On 21 July 2003, the company

called for an extraordinary general meeting ('the EGM') to be held on 5 August 2003 to ratify and approve three resolutions. The first and second resolutions stated that the directors of the company had acted in the best interest of the company when they decided not to subscribe to the two rights issues offered by ACE. The third resolution gave two directors of the company the authority to acquire 2,187,850 ordinary chares in ACE from the sixth respondent at a cost of not more than RM2,187,850. Subsequently, in a letter dated 30 July 2003, the third respondent as the managing director of the company sent an explanatory letter to all the shareholders giving reasons for the company's non-subscription to the two rights issue. The letter stated, inter alia, that in order to take up the rights issue in ACE the company would have to pay RM1,250,200 immediately from its limited cash reserves; the rights issue in ACE was a long term investment which was not in the interest of the company and its shareholders; that acquiring more shares in ACE would seriously hamper the company's plans to expand and meet future contingencies. Before the EGM, the petitioners had rejected the reasons given in the letter of 30 July 2003. During the EGM despite the petitioners' strong opposition in respect of the first and second resolution, the second respondent insisted that all the shareholders had to vote. The petitioners, being the minority shareholders, refused to vote but the EGM was forced through and the first two resolutions were passed. Hence the present petition by the petitioners, as minority shareholders, pursuant to s 181 of the Companies Act 1965 ('the Act') claiming that the affairs of the company had been conducted oppressively and in a manner which was unfairly prejudicial to their interest. In this petition the petitioners sought, inter alia, an order that the shares of the petitioners in the company be purchased by the second to eighth respondents at the fair value price taking into consideration the oppressive acts of the second to eighth respondents. In support of this petition the petitioners submitted that the conduct of the respondents was oppressive as the reasons given by the respondents in their letter dated 30 July 2003 for not subscribing to the rights issue were clearly unsustainable and unsubstantiated. As evidence the petitioners cited that although the respondents claimed that the shares in ACE had no commercial value and was a long term investment, the same people sitting on the board of directors of the sixth respondent were of the view that it was commercially viable to subscribe to the rights issue. The petitioners also submitted that the respondents had not taken into consideration the interest of the company and its minority shareholders and acted in this manner to willfully dilute the company's shareholding in ACE. It was also the petitioner's contention that the respondents had further oppressed the petitioners by calling the EGM and forcing the first and second resolution through knowing that the petitioners' votes were insufficient to contest the passing of these resolutions. The respondents maintained that their decision to renounce both the rights issue offered by ACE was made bona fide in the interests of the company. The sole issue for determination in this petition was whether the company's affairs

had been conducted in a manner oppressive to the petitioners as minority shareholders.

Held, allowing the petition with costs:

(1) Section 181 of the Act warrants the court considering the business realities of the state of affairs and circumstances of the company and not confining itself to a narrow and restricted legalistic scrutiny. In the present case, the petitioners were minority shareholders who neither have control of the company nor representation in the board of directors. The management control of the company was effectively vested in the board of directors which mainly consisted of the respondents who were all from the Soon family, which controlled both ACE and the company. The acts of the second to fifth and eighth respondents as the directors of the company in turning down the two rights issue offered by ACE in which the company was one of the shareholders but at the same time taking up the rights issue themselves either directly or indirectly was oppressive, high handed, domineering and unjust conduct. It showed the directors acting in their own interest rather than in the company's interest. At the time when the company decided not to subscribe to the rights issue which cost about RM2m there was a surplus of RM5.6m in the accounts of the company. The evidence also showed that the directors gained pecuniary advantage when they themselves subscribed to the rights issue offered by ACE, not once but twice. By subordinating their personal interest to those of the company thus, they had conducted the affairs of the company in a manner which was oppressive to the minority shareholders (see para 31).

(2) When the fifteenth petitioner attempted to question the respondent/directors as to their dealings in respect of the rights issue, the respondents convened an EGM to ratify their decisions. The fact that the respondents were able to force through the resolutions at the EGM proved that the petitioners were subjected to a continuing process of oppression as members of the company. This satisfies s 180 of the Act which implies that there must be a continuing series of conduct and not only an isolated act of misconduct (see para 35).

(3) The effect of the oppressive acts was detrimental to the petitioners. The non-subscription to the rights issue resulted in a dilution of shareholdings of the company in ACE which in turn reduced the net tangible assets of the company and made the petitioners lose out on any potential returns or profits from the business of ACE. In the circumstances, the petition was a bona fide attempt to obtain relief under s 181 of the Act (see para 36).

[Bahasa Malaysia summary

Syarikat responden pertama ('syarikat') adalah pegangan pengusahaan dan pelaburan kelapa sawit dengan 26 pemegang-pemegang saham. Responden kedua hingga kelima, termasuklah responden keenam dan ketujuh syarikat sendirian berhad, semuanya pemegang-pemegang saham syarikat, sementara responden kelapan adalah pengarah pengganti. Tambahan lagi, responden kedua hingga kelima dan kelapan berasal daripada keluarga yang sama ('keluarga Soon') dan juga mempunyai kawalan pegangan saham ke atas syarikat responden keenam dan ketujuh. Responden kedua hingga ketujuh memegang 55.7% daripada saham dalam syarikat manakala 20 pempetisyen dalam tindakan ini merupakan pemegang saham minoriti memegang 44.3% saham dalam syarikat. Lembaga pengarah syarikat terdiri daripada responden kedua hingga kelima, responden kelapan dan dua ahli selain keluarga Soon. Aduan pempetisyen-pempetisyen dalam tindakan ini timbul daripada dua hak-hak terbitan yang ditawarkan oleh syarikat dikenali sebagai Ace Agricultural Sdn Bhd ('ACE'). Pada masa itu syarikat responden pertama memegang 20% daripada saham-saham dalam ACE, keluarga Soon secara kolektif memegang 62% daripada saham-saham dalam ACE dan pemegang-pemegang saham yang lain memegang 18% baki saham-saham dalam ACE. Dua hak terbitan itu ditawarkan kepada syarikat itu, yang merupakan salah satu daripada pemegang saham dalam ACE, pada harga RM1 untuk satu saham, tetapi lembaga pengarah syarikat itu memutuskan untuk tidak menerimanya. Pada masa yang sama, responden keenam yang mempunyai lembaga pengarah yang hampir sama dengan lembaga pengarah responden pertama syarikat menerima dua hak terbitan itu. Akibat daripada hak terbitan yang tidak dilanggan oleh syarikat dalam ACE, faedah ekuiti syarikat dalam ACE berkurangan daripada asalnya 20% kepada 10.67%. Semasa AGM syarikat pada 30 Jun 2003, apabila proksi ke-15 pempetisyen mempersoalkan lembaga pengarah syarikat berhubung kenapa ia tidak menerima dua hak terbitan yang ditawarkan oleh ACE, lembaga pengarah syarikat itu menangguhkan jawapan persoalan itu. Pada 21 Julai 2003, syarikat itu memanggil untuk mesyuarat agung luar biasa ('EGM') yang akan diadakan pada 5 Ogos 2003 untuk meratifikasi dan meluluskan tiga resolusi. Resolusi pertama dan kedua menyatakan bahawa pengarah-pengarah syarikat telah bertindak demi kepentingan syarikat apabila mereka memutuskan untuk tidak membeli dua hak terbitan yang ditawarkan oleh ACE. Resolusi ketiga memberikan dua pengarah syarikat itu kuasa untuk memperoleh 2,187,850 saham biasa dalam ACE daripada responden keenam pada harga tidak melebihi RM2,187,850. Berikutan itu, dalam surat bertarikh 30 Julai 2003, responden ketiga sebagai pengarah urusan syarikat telah menghantar surat penjelasan untuk semua pemegang-pemegang saham dengan memberikan sebab-sebab syarikat tidak membeli dua hak terbitan itu. Surat itu menyatakan, antara lain, bahawa bagi tujuan menerima hak terbitan

dalam ACE syarikat perlu membayar RM1,250,200 dengan segera daripada rizab tunai terhadnya; hak terbitan dalam ACE merupakan pelaburan jangka panjang yang tiada kepentingan kepada syarikat dan pemegang-pemegang sahamnya; bahawa memperoleh lebih saham-saham dalam ACE akan menghalang rancangan syarikat untuk berkembang dan mencapai rancangan luar jangka masa depan. Sebelum EGM, pempetisyen-pempetisyen telah menolak sebab-sebab yang diberikan dalam surat 30 Julai 2003. Semasa EGM meskipun bangkangan keras pempetisyen-pempetisyen berkaitan resolusi pertama dan kedua, responden kedua mendesak agar semua pemegang-pemegang saham hendaklah mengundi. Pempetisyen-pempetisyen, yang merupakan pemegang-pemegang saham minoriti, enggan mengundi tetapi EGM tetap dijalankan dan dua resolusi pertama tersebut diluluskan. Justeru itu petisyen ini oleh pempetisyen-pempetisyen, sebagai pemegang-pemegang saham minoriti, menurut s 181 Akta Syarikat 1965 ('Akta') mendakwa bahawa urusan-urusan syarikat telah dilaksanakan secara menindas dan dalam cara yang prejudis tidak adil demi kepentingan mereka. Dalam petisyen ini pempetisyen-pempetisyen memohon, antara lain, perintah bahawa saham-saham pempetisyen-pempetisyen dalam syarikat dibeli oleh responden-responden kedua hingga kelapan pada harga nilai adil dengan mengambilkira tindakan-tindakan bersifat menindas oleh responden-responden kedua hingga kelapan. Untuk menyokong petisyen ini pempetisyen-pempetisyen menghujahkan bahawa perbuatan responden-responden adalah menindas kerana sebab-sebab yang diberikan oleh responden-responden dalam surat mereka bertarikh 30 Julai 2003 untuk tidak membeli hak terbitan adalah jelas tidak boleh dikekalkan dan disahkan. Sebagai keterangan pempetisyen-pempetisyen menyatakan bahawa meskipun responden-responden mendakwa bahawa saham-saham dalam ACE tiada nilai komersial dan merupakan pelaburan tempoh jangka panjang, orang sama yang duduk dalam lembaga pengarah responden keenam berpendapat bahawa ianya secara komersial berdaya maju untuk membeli hak terbitan. Pempetisyen-pempetisyen juga menghujahkan bahawa responden-responden tidak mengambilkira kepentingan syarikat dan pemegang-pemegang saham minoritinya dan bertindak sebegini untuk mencairkan dengan sengaja pegangan saham syarikat dalam ACE. Ia juga penegasan pempetisyen-pempetisyen bahawa responden-responden telah selanjutnya menindas pempetisyen-pempetisyen dengan memanggil untuk EGM dan mendesak pelaksanaan resolusi pertama dan kedua dengan kesedaran bahawa undian pempetisyen-pempetisyen tidak mencukupi untuk mempertikaikan kelulusan resolusi-resolusi tersebut. Responden-responden menegaskan bahawa keputusan mereka untuk menolak kedua-dua hak terbitan yang ditawarkan oleh ACE telah dibuat secara bona fide demi kepentingan syarikat. Satu-satunya isu untuk ditentukan dalam petisyen ini adalah sama

ada urusan-urusan syarikat telah dilaksanakan secara menindas terhadap pempetisyen-pempetisyen sebagai pemegang-pemegang saham minoriti.

Diputuskan, membenarkan petisyen dengan kos:

(1) Seksyen 181 Akta mewajarkan mahkamah mengambilkira realiti keadaan urusan dan keadaan perniagaan syarikat dan tidak membatasinya kepada penelitian perundangan yang terhad dan terbatas. Dalam kes ini, pempetisyen-pempetisyen merupakan pemegang-pemegang saham minoriti yang tiada kawalan ke atas syarikat mahupun wakil dalam lembaga pengarah. Kawalan pengurusan syarikat sebenarnya terletak pada lembaga pengarah yang terutamanya terdiri daripada responden-responden yang kesemuanya daripada keluarga Soon, yang mengawal ACE dan syarikat itu. Tindakan responden-responden kelima hingga kelapan sebagai pengarah-pengarah syarikat yang menolak dua hak terbitan yang ditawarkan oleh ACE di mana syarikat itu merupakan salah satu daripada pemegang saham tetapi pada masa yang sama menerima sendiri hak terbitan sama ada secara langsung atau secara tidak langsung adalah perbuatan bersifat menindas, tidak patut berlaku, mendominasi dan tidak adil. Ia menunjukkan pengarah-pengarah bertindak demi kepentingan masing-masing dan bukan demi kepentingan syarikat. Semasa syarikat memutuskan tidak membeli hak terbitan yang berjumlah lebih kurang RM2 juta terdapat lebihan RM5.6 juta dalam akaun syarikat. Keterangan juga menunjukkan bahawa pengarah-pengarah memperoleh kelebihan kewangan apabila mereka sendiri membeli hak terbitan yang ditawarkan oleh ACE, bukan sekali tetapi dua kali. Dengan mengetepikan kepentingan peribadi mereka berbanding dengan kepentingan syarikat, mereka telah melaksanakan urusan-urusan syarikat dalam cara yang bersifat menindas terhadap pemegang-pemegang saham minoriti (lihat perenggan 31).

(2) Apabila pempetisyen ke-15 cuba menyoal responden-responden/pengarah-pengarah urusan mereka berkaitan hak terbitan itu, responden-responden telah mengadakan EGM untuk meratifikasi keputusan-keputusan mereka. Fakta bahawa responden-responden mampu meneruskan resolusi-resolusi di EGM membuktikan bahawa pempetisyen-pempetisyen tertakluk kepada proses penindasan yang berterusan sebagai ahli-ahli syarikat. Ini memenuhi s 180 Akta yang menyatakan bahawa perlu ada rangkaian perlakuan yang berterusan dan bukan hanya satu tindakan salah laku (lihat perenggan 35).

(3) Kesan tindakan-tindakan penindasan ini menjejaskan pempetisyen-pempetisyen. Hak terbitan yang tidak dibeli diakibatkan oleh pencairan pegangan saham syarikat dalam ACE yang sebaliknya telah mengurangkan aset-aset nyata syarikat dan membuat pempetisyen-pempetisyen mengalami kerugian dalam apa-apa pulangan atau keuntungan berpotensi daripada perniagaan ACE. Dalam keadaan berikut, petisyen itu merupakan percubaan bona fide untuk memperoleh relief di bawah s 181 Akta (lihat perenggan 36).]

Notes

For cases on oppression, see 3(1) *Malall's Digest* (4th Ed, 2006 Reissue) paras 501–548.

Cases referred to

Bright Pine Mills Pty Ltd, Re [1969] VR 1002, SC (refd)
Howard Smith Ltd v Ampol Petroleum Ltd [1974] AC 821, PC (folld)
HR Harmer Ltd, Re [1958] 3 All ER 689, CA (refd)
Jermyn Street Turkish Baths Ltd, Re [1971] 3 All ER 184, CA (refd)
Kong Thai Sawmill (Miri) Sdn Bhd, Re [1978] 2 MLJ 227, PC (refd)
Ngiu-Kee Corporation (M) Bhd & Anor v Pan-Pacific Construction Holdings Sdn Bhd [2008] 1 MLJ 498; [2008] 3 CLJ 335, CA (refd)
Shuttleworth v Cox Brothers & Co (Maidenhead Ltd) & Ors [1927] 2 KB 9, CA (refd)

Legislation referred to

Companies Act 1965 ss 180, 181

Gideon Tan (Vincent Tan with him) (Gideon Tan Razali Zaini) for the petitioners.
Sia Siew Mun (Sia Siew Mun & Co) for the first respondent.
Lim Kian Leong (Tan Keng Teck with him) (Lim Kian Leong) for the second to eighth respondents.

Azahar Mohamed J:

[1] Cases have arisen from time to time where minority shareholders have found it hard to refuse to go along with oppression by the majority. The present action is one of such cases. This is a petition ('encl 1') pursuant to s 181 of the Companies Act 1965 ('the Act') presented on 17 September 2003 by Mr Tong Chor Say and 19 others ('petitioners'). They are the minority shareholders in the first respondent ('the company'). They claimed that the affairs of the company had been conducted oppressively in a manner which was unfairly prejudicial to their interest.

[2] Therefore, in this petition, the petitioners sought the following prayers:

(a) an order that the shares of the petitioners in the company be purchased by the second to eight respondents at the fair value price taking into consideration of the oppressive acts of the second to eight respondents; and

(b) an order that such purchase shall be completed within two months from the date of the order; or

(c) alternatively, an order that the company be wound up by this honourable court; and

(d) an order that a liquidator be appointed to manage the affairs of the company;

(e) such further and other order as this honourable court deems fit; and

(f) that the costs of and occasioned by this petition.

SECTION 181 OF THE ACT

[3] To begin with, it is important to consider the law on oppression as covered by s 181 of the Act. This section provides that where the affairs of a company are being conducted in a manner oppressive to some members, the court may, with the view to bringing to an end the matters complained of, make such order as it thinks fit to remedy the situation. One of the order the court can make is to direct one side should buy the shares of the other. To sustain a successful application under s 181 it is necessary for the petitioner to prove that the conduct must relate to the petitioner in his capacity as a member of the company and it must relate to the conduct of the affairs of the company. Section 181 is in the following terms:

181 Remedy in cases of an oppression

(1) Any member or holder of a debenture of a company or, in the case of a declared company under Part IX, the minister, may apply to the court for an order under this section on the ground —

(a) that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members or holders of debentures including himself or in disregard of his or their interests as members, shareholders or holders of debentures of the company; or

(b) that some act of the company has been done or is threatened or that some resolution of the members, holders of debentures or any class of them has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of the members or

holders of debentures ('including himself'). A

(2) If on such application the court is of the opinion that either of those grounds is established the court may, with the view to bringing to an end or remedying the matters complained of, make such order as it thinks fit and without prejudice to the generality of the foregoing the order may — B

(a) direct or prohibit any act or cancel or vary any transaction or resolution;

(b) regulate the conduct of the affairs of the company in future; C

(c) provide for the purchase of the shares or debentures of the company by other members or holders of debentures of the company or by the company itself;

(d) in the case of a purchase of shares by the company provide for a reduction accordingly of the company's capital; or D

(e) provide that the company be wound up.

(3) Where an order that the company be wound up is made pursuant to paragraph (2)(e) the provisions of this Act relating to winding up of a company shall, with such adaptations as are necessary, apply as if the order had been made upon a petition duly presented to the court by the company. E

(4) Where an order under this section makes any alteration in or addition to any company's memorandum or articles, then, notwithstanding anything in any other provision of this Act, but subject to the order, the company concerned shall not have power without the leave of the court to make any further alteration in or addition to the memorandum or articles inconsistent with the order; but subject to the foregoing provisions of this subsection the alterations or additions made by the order shall be of the same effect as if duly made by resolution of the company. F G

(5) An office copy of any order made under this section shall be lodged by the applicant with the registrar within fourteen days after the making of the order. H

Penalty: One thousand ringgit. Default penalty. I

[4] The authoritative statement of law on this subject matter is to be found in the Privy Council's decision in *Re Kong Thai Sawmill (Miri) Sdn Bhd* [1978] 2 MLJ 227 where the following most important principles are set out:

for the case to be brought within s 181(1)(a) at all, the complaint must identify and prove 'oppression' or 'disregard'. The mere fact that one or more, of those managing the company possess a majority of the voting power and, in reliance upon that power, make policy or executive decisions, with which the complainant does not agree, is not enough. Those who take interests in companies limited by shares have to accept majority rule. It is only when majority rule passes over into rule oppressive of the minority, or in disregard of their interests, that the section can be invoked. As was said in a decision upon the United Kingdom section there must be a visible departure from the standards of fair dealing and a violation of the conditions of fair play which a shareholder is entitled to expect before a case of oppression can be made (*Elder v Elder & Watson Ltd*): Their Lordships would place the emphasis on 'visible'. And similarly 'disregard' involves something more than a failure to take account of the minority's interest: there must be awareness of that interest and an evident decision to override it or brush it aside or to set at naught the proper company procedure (per Lord Clyde in *Thompson v Drysdale*). Neither 'oppression' or 'disregard' need be shown by a use of the majority's voting power to vote down the minority: either may be demonstrated by a course of conduct which in some identifiable respect, or at an identifiable point in time, can be held to have crossed the line. Thirdly, in a number of United Kingdom decisions it has been held that for s 210 to apply the complainant must show oppression continuing up to the date of proceedings (eg, *In Re Jermyn Street Turkish Baths Ltd*); where there has been oppression in the past the section does not bite. Their Lordships agree that the wording of the section (and the same is true of s 181(1)(a)) relates to a present state of affairs: 'are being conducted', powers 'are being exercised' are grammatically clear: the language may be contrasted with that of s 181(1)(b) which refers to an act of the company which has been done or threatened. But this argument must not be taken too far. What is attacked by sub-s (1)(a) is not particular acts but the manner in which the affairs of the company are being conducted or the powers of the directors exercised. And these may be held to be 'oppressive' or 'disregard' even though a particular objectionable act may have been remedied. A last minute correction by the majority may well leave open a finding that as shown by its conduct over a period, a firm tendency or propensity still exists at the time of the proceedings to oppress the minority or to disregard its interests so calling for a remedy under the section. This point is well brought out in *Re Bright Pine Mills Pty Ltd*.

[5] In the case of *Re Jermyn Street Turkish Baths Ltd* [1971] 3 All ER 184, the Court of Appeal observed that the affairs of a company only be said to have been being conducted in a manner oppressive to some part of the members of the company where shareholders, having a dominant power in the company, either exercised that power to procure that something was or was not done in the conduct of the company's affairs or procured by an express or implied threat of an exercise of that power that something was not done in the conduct of the company's affairs. The Court of Appeal added that to amount to oppression such conduct must be unfair of 'burdensome, harsh and wrongful' to the other members of the company or some of them and lack that degree of probity which they were entitled to expect in the conduct

of the company's affairs. Thus, oppression must import that the oppressed were being constrained to submit to something which was unfair to them as the result of some overbearing act or attitude on the part of the oppressor.

[6] In this regard the case of *Ngiu-Kee Corporation (M) Bhd & Anor v Pan-Pacific Construction Holdings Sdn Bhd* [2008] 1 MLJ 498; [2008] 3 CLJ 335 is instructive. There, our Court of Appeal said that there are four broad classes of conduct that would justify judicial remedy under s 181 of the Act, namely:

(a) oppressive conduct;

(b) conduct in disregard of interests;

(c) unfairly discriminatory conduct; or

(d) prejudicial conduct.

[7] The question whether there is oppression, disregard of interest, unfair discrimination, or whether the act complained of is prejudicial is one that must be determined according to the facts of each particular case. In addition, our Court of Appeal observed that in Malaysia the authorities show that it is the minority shareholders who should sell their shares to the majority shareholders when they have shown that they have been oppressed or the majority shareholders have disregarded the minority shareholders. Finally, the Court of Appeal held that for the petitioner to succeed in his application for the said reliefs, he must show that it was the affairs of the company which were being conducted in an oppressive manner, and that the respondent company had oppressed the minority shareholders which in this case is the petitioner.

THE BACKGROUND FACTS

[8] The company was incorporated on 1 April 1959 as a private limited company. The principal businesses of the company are cultivation of oil palm and investment holding. The registered address of the company is at Suite 6-01, Level 6, Wisma Technip, No 241, Jalan Tun Razak 50400 Kuala Lumpur.

[9] It has an authorised share capital of 1,000,000 divided into 1,000 ordinary shares of RM1000 each. The company has a paid-up capital of RM420,000. The petitioners are the minority shareholders. The company has 26 shareholders; the total percentage of shares held by the petitioners are 44.3% and the total percentage shares held by the second to seventh respondents are 55.7%. None of the petitioner is on the board of directors of Batang Malaka.

[10] The second respondent is a shareholder, director and chairman of the company. The third, fourth, and fifth respondents are also the shareholders and directors of the company. The sixth and seven respondents are private limited companies and are also shareholders of the company. The eight respondent is an alternate director of the company.

[11] In relation to the above, it is important to take note of the fact that the second to fifth and eight respondents are from the same family, that is to say the Soon family. It is also pertinent to make a note that the sixth and seven are companies, which are controlled by the Soon family.

THE PETITIONERS' CASE

[12] Non-subscription of the right issues in Ace Agricultural Sdn Bhd (ACE).

[13] The company is a shareholder of a company known as ACE incorporated on 7 June 1968 as a private limited company. The shareholdings of ACE before 2 July 2001 are as follows. The Soon Family holds 62%; the company holds 20%; and other shareholders hold 18%.

[14] The board of directors of ACE consists of the second respondent, the third respondent, the fourth respondent, Pauline Soon Siew Hwa and Sulaiman bin Ninam.

[15] There were two rights issue exercise carried out by ACE on 2 July 2001 and 28 May 2002. Both rights issue were subscribed, inter alia, by the second, third, fourth, fifth, sixth and eight respondents herein, which as I have stated earlier is controlled by the Soon family. It is owned by the Soon family and its board of directors consists of the second respondent, the third respondent, the fourth respondent, the eight respondent, Soon Boon Seng, and Soon Lay Teong. On the other hand, the board of directors of the company decided not to take up the rights issue offered by ACE.

[16] It is not disputed that as a result of the non-subscription of the rights issue by the company in ACE, the equity interest of the first respondent in ACE has been reduced from the initial 20% to 13% thereafter 10.67% respectively.

[17] Next, during the 45th Annual General Meeting of the first respondent on 30 June 2003 ('the AGM'), the proxy of the fifteen petitioner, Mr Tan Tin Leong questioned the board of directors of the reasons for not:

(a) taking up the two rights issue offered by ACE; and

(b) having a shareholders meeting to discuss the matter of rights issue offered by ACE.

[18] The board of directors did not answer to the above questions at the AGM but merely stated that they would seek legal opinion on the matter.

[19] Then after that on 21 July 2003, the first respondent called for an extraordinary general meeting to be held on 5 August 2003 ('the EGM'), to ratify and approve the following:

(a) that the directors of the first respondent has acted bona fide in the best interest of the company for non-subscription of the rights issue on 2 July 2001 offered by ACE ('Resolution No 1');

(b) that the directors of the first respondent has acted bona fide in the best interest of the company for non-subscription of the rights issue on 28 May 2002 offered by ACE ('Resolution No 2'); and

(c) that authority is given to two directors to acquire 2,187,850 ordinary shares in ACE from the sixth respondent at a cost not in access of RM2,187,850.('Resolution No 3').

[20] Subsequently, the third respondent, as the managing director of the company, had on 30 July 2003 sent a letter to all the shareholders explaining the reasons for non-subscription of the rights issue. According to him the reasons are as follows:

(a) in order to take up the rights issue in ACE, the company would have to pay RM1,250,200 immediately from its limited cash reserves;

(b) ACE created the rights issue for long term purposes of purchasing an estate and replanting the trees (for the next five years);

(c) such long term plans would all likelihood take years to provide meaningful returns in income and this would in turn affect the company's ability to pass on the returns to the shareholders;

(d) a long term investment such as this is not in the interest of the company and its shareholders since it has its plans to expand and improves its estates;

(e) if the company acquires more shares in the authorised rights issue, it would seriously hamper the company plans to expand or meet future contingencies. The board of directors thought it was in the best interest of the company to accumulate its reserves for its own expansion and replanting expenditure;

(f) there is no market value for the shares in ACE as it is not tradable in the stock market and the Articles of Association of ACE restrict transfers; and

(g) the board of directors was mindful of the minority shareholders expressed preference to plough profits back and invest in the company as oppose to further investing in ACE.

[21] Before the EGM, the petitioners had vide their letter dated 5 August 2003 rejected the reasons given by the board of directors of the company. The gist of their grievances is as follows:

(a) the company had more than RM5.6m cash reserve at the material time;

(b) the board of directors of the sixth respondent which was almost identical to the board of directors of the company, had decided to take up the two rights issue evidencing that it was commercially viable to do so, whilst the same person sitting at the board of directors of the company had a whole different opinion; and

(c) the company's net tangible assets had been greatly reduced by reason of the non-subscription of the rights issue.

[22] Hence according to the petitioners, Resolutions No 1 and No 2 were to be rejected; and Resolution No 3 should be duly carried out by the board of directors for the benefits of the company.

[23] During the EGM on 5 August 2003, despite the strong opposition of the petitioners in respect of Resolutions No 1 and No 2, the second respondent insisted that all the shareholders of the company should vote to ascertain the position of the shareholders. The petitioners knowing full well that they are only the minority shareholders refused to vote. The EGM was forced through. Resolutions No 1 and No 2 were passed and Resolution No 3 was declined.

[24] According to the petitioners, it is clear and obvious that the conduct of the respondents were oppressive as the reason given by the respondents for not subscribing the rights issue were clearly unsustainable and unsubstantiated as on one hand the respondents claimed that the shares in ACE had no commercial value and was a long term investment but on the other hand the same people sitting on the board of the sixth respondent were of the view that it was commercially viable to subscribe the rights issue. It is the case of the petitioner that it is apparent that the respondents did not take into consideration the interest of the company and its minority shareholders and did so to willfully dilute the company's shareholding in ACE. The petitioners maintain that the respondents have further oppressed the petitioners by calling the EGM and forcing it through knowing full well that the petitioners' votes were unable to contest the passing of Resolutions No 1 and 2 and declining Resolutions No 3. By reasons of the aforesaid, the petitioners assert that their interests have been unfairly and unjustly

prejudiced.

THE RESPONDENTS' CASE

[25] The respondents' decisions to renounce both the rights issue offered by ACE were made bona fide in the interests of the company. According to the respondents, the company's decision to renounce the rights issue of ACE was fully disclosed in Note 4 to the financial statements set out in the audited account ended 31 December 2002 which was received by the shareholders in the 45th AGM held on 30 June 2003 and approved with no votes against by any shareholders. The sixth respondent's decision to take up the rights issue of ACE was made based on the sixth respondent's own corporate objectives which did not involve any immediate plans for expansion and/or replanting. Moreover, the respondents said that the second, third, fourth, fifth and eight respondents had put much effort into ensuring that the company's plantation produced good results and were constantly seeking ways to improve the company's plantation operation by seeking various experts' opinion on the company's plantation. The second, third, fourth, fifth and eight respondents had also made efforts to locate suitable lands for the company's expansion and replanting in accordance with the company's plan for expansion. According to the respondents that based on the above, the petitioners' allegations that the respondents did not take into consideration the interests of the company and its minority shareholders and willfully diluted the company's shareholding in ACE are baseless.

[26] By the reasons of the aforesaid, it is submitted by learned counsel for the respondents that the board of directors of the company and the respondents did not in any way whatsoever had willfully oppressed the interest of the petitioners as minority shareholders. On the contrary, he argued that the decisions made by the board of directors were made in the best interest of the company and such decision was made honestly and also bona fide.

FINDINGS OF THE COURT

[27] Having regard to the circumstances of this case and on the totality of the facts presented, the question that I have to decide is this: Is there any justification for this court to find that the company's affairs had been conducted in a manner oppressive to the petitioners as members of the company in a manner which was unfairly prejudicial to the petitioners' interest? I answer this in the affirmative for the following reasons.

[28] First and foremost, s 181 of the Act warrants this court in looking and considering at the business realities of the state of affairs and circumstances of

A the company and not confine to a narrow and restricted legalistic scrutiny. The word 'oppressive' must be given its ordinary meaning. It means draconian, iron fisted, high-handed, domineering, harsh and unjust.

B **[29]** Now, it is true that the petitioners' only complaint in this action relates to the non-subscription of the two rights issue offered by ACE to the company. Admittedly, prior to this the petitioners had no complaints concerning the performance and the management of the company. On that note, the important point to note here is that the petitioners are complaining about the high-handed, domineering and unjust conduct of the respondents in disregarding the petitioners' interests as members of the company when they took up the rights issues offered by ACE themselves for their own personal interests.

D **[30]** In this context the authority that I would like to refer is *Re Bright Pine Mills Pty Ltd* [1969] VR 1002 where the Supreme Court of Victoria held that where the directors ignored business opportunities that the company could have taken up so that another business in which they were interested could take advantage of them is oppressive.

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[31] The facts which cannot be disputed in the case at hand are that there were two rights issue exercise carried out by ACE for the purpose of obtaining funds to acquire more palm oil estates. The right issues were offered to its shareholders with RM1 a share. The company, being one of the shareholders of ACE was also offered with the two rights issue. The board of directors of the company then decided for the company not to subscribe for the rights issue although at the material time there were surplus money of RM5.6m in the accounts of the company which could be utilised to subscribe for the rights issue which costs about RM2m. In the respondents' affidavit in reply affirmed by the second respondent on 11 March 2004 ('encl 6') at para 35, the second respondent in essence averred that the decisions to renounce both the rights issues of ACE were made bona fide in the interests of the company. Significantly, in making this statement the second respondent does not provide details. For one thing, he conveniently does not substantiate his assertion by, for example, exhibiting the relevant board of directors' minutes on the decision to renounce the right issues of ACE. On this critical matter, the second respondent's affidavit is bereft of cogent and convincing explanation. At this point I should mention that there is also no credible documentary evidence to substantiate the contention of the respondents that the board of directors decided not to utilise the company's funds to take up the rights issue because of the plan to expand the company existing oil palm plantation. It is also important to point out that the purchase by the company of Batu Tinggi Estate only came much later in the year 2005.

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[32] The petitioners are minority shareholders and do not have control of the company and have no representation in the board of directors. The management and control of the company effectively vest in the board of directors whom mainly consisted of the respondents. One important fact that requires to be kept in mind is that the respondents are from the Soon family which controls both ACE and the company. They themselves went behind the company's back and subscribed for the right issues of ACE in which they have personal interests in it. In my view, the act of the board of directors of the company (mainly consisted of the second to fifth and the eighth respondents) turning down the second rights issue offered by ACE in which the company was one of the shareholders but at the same time they themselves took up the right issue directly and indirectly for their own personal interests were indeed oppressive. It was a high-handed, domineering and unjust conduct. In short, the directors acted in their own interests when they decided to turn down the rights issue for the company.

[33] It is a general principle of law that conduct can be oppressive within the s 180 of the Act even where it is not aimed at gaining a pecuniary advantage (see *Re HR Harmer Ltd* [1958] 3 All ER 689). But in this case it was made worse as the evidence points to this: the directors gained pecuniary advantage when they themselves subscribed the rights issue offered by ACE.

[34] As a matter of fact, the directors did not do it once but twice to deprive of the minority shareholders the benefits of the two right issues and advanced their own personal interests. In this sense the respondents put their personal interests above their duty to the company. They were wrong. By subordinating their personal interests to those of the company, they conducted the affairs of the company in a manner which was oppressive to the minority shareholders. What has happened in this case is not merely a decision by the directors on a matter of business policy to which the court cannot interfere. I accept the principle of law that there is no appeal on merits from management decisions to courts of law: nor will courts of law assume to act as a kind of supervisory board over decisions within the powers of management honestly arrived at (see *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821). Undoubtedly, it is not the business of this court to manage the affairs of the company, that is for the shareholders and board of directors (see *Shuttleworth v Cox Brothers & Co (Maidenhead Ltd & Ors)* [1927] 2 KB 9). But in the present case the affairs of the company had been conducted in a manner which was oppressive to the petitioners as members of the company. Section 180 of the Act empowers the court where the affairs of a company are being conducted in a manner oppressive to some members, to bring to an end the matters complained of, and make such order as it thinks fit to remedy the situation.

[35] In addition to that, the board of directors after being questioned of such dealings convened an EGM in an attempt to ratify their decisions and successfully did so despite strong objections by the petitioners who were overwhelmed by the respondents by virtue of their positions and majority share holdings. The respondents forced through the resolutions at EGM on 5 August 2003. This proved that the petitioners had been subjected to a continuing process of oppression as members of the company. It is important to bear in mind that as the wording of s 180 implies, there must be a continuing course of conduct, not only an isolated act of misconduct or irregularity. In my view the majority had neglected to use their voting power to curtail the actions of the directors of the company and thereby had permitted and condoned their oppressive conduct. To my mind, this clearly is an oppressive act committed in the affairs of the company against the minority shareholders.

[36] The effect of the oppressive acts is detrimental to the petitioners. ACE is a palm oil cultivation and investment company owning a lot of lands. The non-subscription of the rights issue resulted in dilution of share holdings of the company in ACE and causing an acute impact to the minority shareholders and thereby substantially reduced the net tangible assets of the company. Furthermore, the petitioners have also lost out on any potential returns or profits derived from the business of ACE, where the price of palm oil has escalated. The reduction of the company's interests in ACE from 20% to 10.67% had material impact as the company's entitlement to the dividends issued by ACE would strictly depended on its shareholdings in it. In this regard it is relevant to note that ACE's revenue had doubled from RM11.03m in year 2002 to RM22.94m in year 2006 and its profits after taxation had increased from approximately RM3.86m in year 2002 to approximately RM9.24m in year 2006.

[37] In the end, this petition is a bona fide attempt to obtain relief under s 181 of the Act. In my judgment, the petitioners have made out their case that the company's affairs had been conducted in a manner which was oppressive to them as the members of the company. To put an end to this particular form of oppression, I see no alternative but to make an order that one side should buy the shares of the other. For these reasons I make the following orders:

(i) grant an order in terms of encl 1 prayer (a) of para 31, that is to say an order that the shares of the petitioners in the first respondent be purchased by the second to eighth respondents at the fair value price taking into consideration of the oppressive acts of the second to eighth respondents;

(ii) I also grant an order in terms of encl 1 prayer (b) of para 31, that is to say an order that such purchase shall be completed within two months from the date of the order; and

(iii) I also order that the respondents to pay the costs to be taxed to the petitioners.

Petition allowed with costs.

Reported by Kohila Nesan